

83-284

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AUG 22 1983

ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN C. MOON and ZION
INDUSTRIAL CORPORATION,

Petitioners,

vs.

HYOSUNG AMERICA, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. DAVIS
LAW OFFICES OF ROBERT J. DAVIS
ALFRED A. CALABRO
CALABRO, CALABRO & CALABRO

BY: ALFRED A. CALABRO

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Attorneys for Petitioners

QUESTIONS PRESENTED

Petitioners sought an order staying the judgment of the district court under Rule 62(b), F.R.C.P., to prevent the expiration of the appeal period prescribed by Rule 4(a), F.R.A.P., pending resolution of Petitioner's motion to vacate the judgment under Rule 60(b), F.R.C.P.

1. Does the district court order of November 24, 1982, staying the "case and judgment" toll the running of the appeal period provided by Rule 4(a), F.R.A.P., pending resolution of a motion to vacate the judgment under Rule 60(b), F.R.C.P.?

2. Does the appellate court have jurisdiction over an appeal untimely filed where, in reliance upon the district court's order staying the judgment

and the case, Petitioners filed a Notice of Appeal after the expiration of the appeal period but within the new deadline they reasonably assumed the stay provided?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JOHN C. MOON and ZION
INDUSTRIAL CORPORATION,

Petitioners,

vs.

HYOSUNG AMERICA, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioners, JOHN C. MOON and ZION INDUSTRIAL CORPORATION, respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 24, 1983.

OPINION BELOW

The judgment and order of the Court of Appeals, not yet reported, appears in Appendix L.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on May 24, 1983, dismissing Petitioners' appeal from the judgment of the District Court for the Central District of California, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Federal Rules of Civil Procedure,
Rule 60(b)

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding. . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . .

Rule 62(b)

In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of . . . a motion for relief from a judgment or order made pursuant to Rule 60. . . .

Federal Rules of Appellate Procedure,

Rule 4(a)(1)

In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed after the date of entry of the judgment or order appealed from. . . .

Rule 4(a)(5)

The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court requires otherwise.

STATEMENT OF THE CASE

This diversity action was brought by Hyosung America, Inc., plaintiff-appellee-respondent (Respondent), against John C. Moon and Zion Industrial Corporation, defendants-appellants-petitioners (Petitioners), seeking specific performance of an agreement to transfer certain property.

After a trial by Court without a jury, the Court announced its decision

in favor of plaintiff. On October 28, 1982, plaintiff through its counsel served a copy of the Proposed Findings of Fact and Conclusions of Law and Proposed Judgment on counsel for Defendants, and on October 29, 1982, filed said documents with the Clerk of the District Court. On that same day, October 29, 1982, the Court signed the Findings of Fact and Conclusions of Law and Judgment, without any opportunity on the part of the Defendants to Object to such Findings, Conclusions and Judgment.

On November 1, 1982, the Clerk of the Court mailed Notice of Entry of the Judgment to the parties through their counsel (App. Exh. A). However, on November 3, 1982, and before receiving the Notice of Entry of Judgment or

otherwise becoming aware that Judgment had in fact been entered, counsel for Defendants served and filed Objections to the Proposed Judgment; Findings of Fact and Conclusions of Law.

On that same day, November 3, 1982, at approximately 4:00 P.M., then sole counsel for Defendants, Mr. Robert J. Davis, Esquire, collapsed in his office and was admitted to the hospital for a possible heart attack or high blood pressure problems. Mr. Davis was later released, ordered to stay away from his office and placed on Atenlonel medication which made him drowsy and dizzy. On November 8, 1982, Mr. Davis returned briefly to his office and learned for the first time that Judgment had been entered on October 29, 1982.

On November 12, 1982, Mr. Davis, on behalf of Defendants filed an Ex Parte Motion to Vacate Entry of Judgment or in the Alternative to Change the Date of Entry of Judgment (App. Exh. B). In his declaration in support of said motion Mr. Davis relates the facts relative to the collapse he suffered in his office (paragraphs 6 and 7), and requested in his declaration that the entry of judgment be vacated or in the alternative that the date of entry of judgment be designated the date the motion was decided (paragraph 10).

In his declaration Mr. Davis further stated that the request was made so the court might consider the Objections filed by Mr. Davis, and that had the Judgment been entered as provided in Local Rule 7(a) there would have been no

need for the motion (paragraph 9). Said motion contended that the judgment was entered prematurely and without notice and thus was void under Rules 52(a), 58, 60(b) of the Federal Rules of Civil Procedure and Rule 7(a) of the local Rules for Practice for the United States District Court, Central District of California (App. Exh. C).

The trial Judge, the Hon. Manuel Real, was absent from the Los Angeles area and was not available to rule on the Ex Parte Motion filed by Mr. Davis on November 12, 1982. Accordingly, on November 22, 1982, 24 days after entry of the judgment, Petitioners filed a formal motion to vacate the judgment under Rule 60(b), F.R.C.P. (App. Exh. D). Petitioners concurrently filed an ex parte application for an order (1) to

shorten time for the hearing on the Rule 60(b) motion, and (2) to stay the judgment of the district court under Rule 62(b), F.R.C.P., pending the hearing on the Rule 60(b) motion (App. Exh. E). Petitioners sought the above orders to preserve the district court's jurisdiction to hear the Rule 60(b) motion and to preserve their right to appeal pending resolution of the motion (App. Exh. F: Declaration of Alfred Calabro, page 4, paragraphs 11, 12, 13).

The trial Judge, the Honorable Manual Real, was still absent from the Los Angeles area, and the motion was referred to another Judge of the District Court, the Honorable Laughlin E. Waters. On November 24, 1982, 26 days after the entry of Judgment, Judge

Waters made the following ex parte order:

"The Court orders the above-entitled case and Judgment hereon are stayed until December 13, 1982." (App. Exh. G).

Counsel for Petitioners believe the date of December 13, 1982, was the expected date of return of Judge Real. In reliance upon the District Court's order staying the Judgment and the case, Petitioners did not file a Notice of Appeal within the 30 day period provided by Rule 4(a), F.R.A.P. Counsel for Petitioners believed that the filing of a Notice of Appeal would have ousted the District Court of jurisdiction, thus preventing any consideration of Petitioners' motion. On December 13, 1982, Judge Real conducted a hearing on Petitioners' Motion pursuant to which Judge

Waters had issued the stay order recited above. At the conclusion of the hearing, Judge Real made the following Order:

"Hearing held and Court denies the Defendants' Motion to Vacate Entry of Judgment or in the Alternative to Change Date of Entry of Judgment." (App. Exh. H)

On that same date, December 13, 1982, Petitioners filed a Notice of Appeal (App. Exh. I). Petitioners contend that by allowing the hearing, Judge Real also impliedly ruled the court had jurisdiction to entertain the motion and that the stay order issued by Judge Waters had effectively stayed the entire case without penalty, consequence or other disadvantage to Petitioners.

On February 25, 1983, a prebriefing conference was held in this matter with conference attorney, Richard G. R.

Schickele, Esquire. A question was raised by the conference attorney concerning the timeliness of the Notice of Appeal filed by Petitioners on December 13, 1982. The Order made by the Court on November 24, 1982, staying the "case and Judgment" was reviewed by all counsel and the conference attorney, and it was the then opinion of counsel for Petitioners that the Order made by the District Court on November 24, 1982, effectively stayed not only the execution of the Judgment, but the entry of the Judgment and all proceedings possible thereunder, including the running of any period for the filing of a Notice of Appeal. Petitioners' counsel fairly believed that by using the words "the above-entitled case and Judgment hereon are stayed" that such language extended

to every facet of the proceedings in the trial Court including the running of the time within which the Notice of Appeal had to be filed. However, counsel for Petitioners wished to more completely review the file and the law and requested from the conference attorney and further action in the matter be deferred until April 1, 1983.

Counsel for Petitioners reviewed the file and conferred with each other concerning the question raised by the conference attorney concerning the timeliness of the Notice of Appeal. It was the opinion of counsel for Petitioners that the order of November 24, 1982, effectively stayed the time for filing the Notice of Appeal and that there was no need to bring any motion in the District Court for that purpose.

Also, there was a question in the minds of counsel for Petitioners whether or not the District Court would have jurisdiction to entertain a motion to clarify the November 24, 1982, order since the Notice of Appeal had probably effectively ended the jurisdiction of the District Court to hear any further motions.

On April 15, 1983, counsel for Respondent elected to file a Motion to Dismiss Petitioners' appeal as untimely, or in the alternative, to limit appellate jurisdiction to review the District Court's order denying the Rule 60(b) motion (App. Exh. J). Petitioners opposed dismissal of the appeal from the judgment on three grounds. (1) The District Court's order staying the judgment and the case until December 13,

1982, tolled the appeal period provided by Rule 4(a), F.R.A.P. (2) The appellate court has jurisdiction to decide an untimely appeal where appellant relied to his detriment on the District Court's assurance that the appeal period had been tolled. (3) The appellate court may remand an untimely appeal to the District Court to determine whether the untimeliness was due to excusable neglect (App. Exh. K).

On May 24, 1983, the appellate court granted Respondent's Motion to Dismiss Petitioners' appeal from the underlying judgment. The court held that the Rule 62(b) stay did not toll the time for appeal. The court did not address the issue of Petitioners' reliance upon conduct of the District Court indicating that the appeal period had been

tolled. The court entered an order limiting appellate jurisdiction to review of the order denying the Rule 60(b) motion (App. Exh. L).

The order dismissing the appeal from the underlying judgment is a final judgment disposing of the case on the merits. **Jung v. K. & D. Mining Co.** (1958) 365 U.S. 333, 78 S.Ct. 764, 2 L.Ed.2d 806; **Catlin v. United States** (1945) 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911; **Rosenberg Bros. & Co., Inc. v. Curtis Brown Co.** (1923) 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372.

The pendency of the appeal from the Rule 60(b) motion does not affect the finality of the order dismissing the appeal from the underlying judgment. Rule 60(b), F.R.A.P.; **Browder v. Director, Illinois Dept. of Corrections**

(1978) 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521.

A petition for Writ of Certiorari is the appropriate procedure to review the appellate court's dismissal of the appeal for lack of jurisdiction. **Thompson v. Immigration and Naturalization Service** (1964) 375 U.S. 385, 84 S.Ct. 397, 11 L.Ed.2d 404; **United States v. F. & M. Schaefer Brewing Co.** (1958) 356 U.S. 227, 78 S.Ct. 674, 2 L.Ed.2d 721.

REASONS FOR GRANTING THE WRIT

- 1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS AS TO THE PROPER INTERPRETATION OF RULE 62(b), F.R.C.P.**

Rule 62(b), F.R.C.P., provides that a District Court "may stay the execution of or any proceedings to enforce a judgment pending the disposition of

. . . a motion for relief from a judgment or order made pursuant to Rule 60."

The Fourth Circuit Court of Appeal held that while the simple filing of a Rule 60(b) motion does not affect the finality of the judgment or suspend its operation, where the district court orders its judgment stayed pursuant to Rule 62(b), there is no final appealable judgment until the stay is dissolved or the motion is ruled on. **Paxman v. Wilkerson** (4th Cir. 1974) 502 F.2d 1163 (table), 18 Fed.R.Serv.2d 1554.

In this case, the Ninth Circuit Court of Appeal held that a Notice of Appeal, filed promptly upon dissolution of the Rule 62(b) stay, was untimely.

The decision of the Ninth Circuit in this case directly conflicts with the decision of the Fourth Circuit. This

conflict places litigants attempting to resolve their Rule 60(b) claims, without forfeiting their right to appeal, in an untenable position. The motion to vacate the judgment under Rule 60(b) does not toll the time for filing the Notice of Appeal. Rule 60(b), F.R.C.P.; **Browder v. Director, Illinois Department of Corrections, supra.** The filing of a Notice of Appeal, however, divests the district court of jurisdiction to entertain the Rule 60(b) motion. **Petrol Stops Northwest v. Continental Oil Co.** (9th Cir. 1981) 647 F.2d 1005; cert. denied 454 U.S. 1098, 100 S.Ct. 672; **Contemporary Mission, Inc. v. United States Postal Serv.** (2d Cir. 1981) 648 F.2d 97; **Weiss v. Hunna** (2d Cir. 1963) 312 F.2d 711 cert. denied 374 U.S. 853, 83 S.Ct. 1920, 10 L.Ed.2d 1073.

Petitioners attempted to resolve this dilemma by obtaining a stay pursuant to Rule 62(b). The procedure Petitioners adopted in this case is reasonable. The district court retains jurisdiction over the judgment after entry but prior to the filing of an appeal. **Kirtland v. J. Ray McDermott & Co.** (5th Cir. 1978) 568 F.2d 1166.

Resolution of this conflict is necessary to clarify the relationship between Rule 62(b) F.R.C.P., and Rule 4(a), F.R.A.P., to avoid misunderstanding resulting in loss of the right to appeal, as exemplified by this case. This Court has recognized that granting of certiorari is warranted in cases involving the proper application of the federal rules of civil and appellate procedure. **Browder v. Director,**

Illinois Department of Corrections,
supra; Hanna v. Plumer (1965) 380 U.S.
460, 85 S.Ct. 1136, 14 L.Ed.2d 8; La Buy
v. Howes Leather Co. (1956) 352 U.S.
249, 77 S.Ct. 309, 1 L.Ed.2d 290,
rehearing denied 352 U.S. 1019, 77 S.Ct.
553.

**2. THE DECISION BELOW RAISES
SIGNIFICANT AND RECURRING PRO-
BLEMS CONCERNING APPELLATE
JURISDICTION BASED ON THE
UNIQUE CIRCUMSTANCES DOCTRINE.**

The Ninth Circuit's decision in this case reflects important statutory and policy considerations growing out of efforts to invoke appellate jurisdiction based on the unique circumstances doctrine. To what extent does the policy favoring termination of litigation reflected in Rule 4(a), F.R.A.P., offset

the policy of honoring a party's good faith reliance upon a judicial officer, reflected in the unique circumstances doctrine?

This Court has held that the appellate court has jurisdiction to decide an appeal where the notice was not filed within the period prescribed by Rule 4(a) in reliance upon conduct of the district court indicating that the time for appeal had been tolled as a result of a post-trial motion. **Thompson v. Immigration and Naturalization Service, supra**, (district court erroneously declared that post-trial motion was untimely); **Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.** (1962) 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (district court extended time for appeal

based on erroneous finding of excusable neglect).

The unique circumstances doctrine has been applied in various contexts to uphold appellate jurisdiction where the lower court had erroneously indicated that the appeal period had been extended. **Lieberman v. Gulf Oil Corp.** (2d Cir. 1963) 315 F.2d 403 (motion to extend time for appeal granted based on misunderstanding as to whether amendment of judgment tolled time for appeal); **Chipser v. Kohlmeyer & Co.** (5th Cir. 1979) 600 F.2d 1061 (remand to district court to determine existence of good cause where misapprehension of the meaning of a court order was compounded by misleading response by trial court); **Alvestad v. Monsanto Co.** (5th Cir. 1982)

671 F.2d 908 (accepted unique circumstances doctrine but found no unique circumstances exist where no evidence that appellant had been misled by the trial court); **Needham v. White Laboratories** (7th Cir. 1981) 639 F.2d 394 (district court erroneously determined that motion to reconsider post-trial order tolled time for appeal); **Martinez v. Trainor** (7th Cir. 1977) 556 F.2d 818 (accepted unique circumstances doctrine but found no unique circumstances where district court accepted defective post-trial motion, respondents having promptly pointed out the deficiencies); **United States v. Velez** (11th Cir. 1982) 693 F.2d 1081 (applied where bondsman relied on oral representations of magistrate in modifying bond agreement); **Seshachalam v. Creighton Univ. School of**

Medicine (8th Cir. 1976) 545 F.2d 1147, appeal dismissed 549 F.2d 79, cert. denied 433 U.S. 909, 97 S.Ct. 2974, 53 L.Ed.2d 1093 (remand to district court to determine existence of excusable neglect where appellant erroneously believed second post-trial motion tolled time for appeal); **Hernandez-Rivera v. Immigration and Naturalization Serv.** (9th Cir. 1979) 630 F.2d 1352 (applied where immigration court erroneously extended time for appeal); **National Industries Inc. v. Republic National Life Insurance Co.** (9th Cir. 1982) 677 F.2d 1258 (district court erroneously extended time pending resolution of Rule 60(b) claim); **Estate of Butler's Tire & Battery Co., Inc.** (9th Cir. 1979) 592 F.2d 1028 (applied where district court scheduled hearing on motion to extend

for a date beyond the appeal period); **Carlile v. South Routt School District RE3-J** (10th Cir. 1981) 652 F.2d 981 (applied to erroneous order tolling time for filing employment discrimination claim); **Inglese v. Warden, U.S. Penitentiary** (11th Cir. 1982) 687 F.2d 362 (district court erroneously determined that post-trial motion was timely).

In this case, however, the Ninth Circuit has implicitly rejected the doctrine of unique circumstances where the litigants were misled as to whether the district court's order staying the judgment pending resolution of the Rule 60(b) claim tolled the time for appeal. This decision conflicts with the decision of the Seventh Circuit in **Needham**, the Fifth Circuit in **Chipser**, and the Second Circuit in **Lieberman**

where litigants misapprehended the nature of a court order and where that confusion was compounded by a misleading response by the district court. The decision in this case is also difficult to reconcile with the decision of this Court in **Thompson** and the recent decision of the Eleventh Circuit in **Inglese** where litigants failed to file a timely appeal based on the district court's erroneous determination that the post-trial motion was timely. In each of these cases, the principle of honoring a party's good faith reliance upon a judicial officer prevailed where the misapprehension concerned the timeliness of the character of the post-trial motion. In the Ninth Circuit, however, this principle has apparently succumbed

to the goal of securing an end to litigation at all costs.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Ninth Circuit.

Respectfully submitted

ROBERT J. DAVIS
LAW OFFICER OF
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ALFRED A. CALABRO
CALABRO, CALABRO & CALABRO

BY: ALFRED A. CALABRO

Attorneys For Petitioners

DECLARATION OF ALFRED A. CALABRO

I, ALFRED A. CALABRO, DECLARE as follows:

1. I am an active member of the bar of the State of California and I am admitted to practice before this Court. I am a member of the law firm of Calabro, Calabro & Calabro, who together with Robert J. Davis, Esq., are counsel of record for Defendants-Appellants-Petitioners in this action, John C. Moon and Zion Industrial Corporation.

2. I make this declaration in support of this Petition for Writ of Certiorari.

3. I believe that the Exhibits set forth in support of this Petition contain true and accurate text of the relevant portions of the papers and pleadings from the District Court and

the Court of Appeal relating to this appeal. I further believe the facts related in the Petition are true and accurate.

4. That in keeping with Rule 21 (4), (5) of the revised rules for the Supreme Court, Declarant has sought to keep this petition "as short as possible." Petitioners have sought to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration by the Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 18th day of August, 1983 at North Hollywood, California.

BY:


ALFRED A. CALABRO

Attorney for Petitioners

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HYOSUNG AMERICA, INC.,

Plaintiff(s)

CASE NUMBER
CV 81-4784-R

vs

JOHN C. MOON, et al.,

Defendant(s)

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR
ATTORNEY(S) OF RECORD:

You are hereby notified that
JUDGMENT in the above entitled case
was entered in the docket on Oct 29
1982.

You are also notified that if this
case was tried and you introduced
exhibits into evidence, they must be
claimed at this office after the expir-
ation of thirty days from the receipt of
this notice. (After sixty days in cases

in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

Civ 26 (10/78)

NOTICE OF ENTRY

(Certificate Of Mailing Omitted)

APPENDIX B

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INDUSTRIAL COPORATION

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HYOSUNG AMERICA, INC.,

Plaintiff,

vs.

JOHN C. MOON and ZION
INDUSTRIAL CORPORATION,

Defendants.

CASE NO.: CV 81 4784 R

EX PARTE MOTION TO VACATE
ENTRY OF JUDGMENT OR IN
THE ALTERNATIVE TO CHANGE
THE DATE OF THE ENTRY OF JUDGMENT

TO: MANUEL L. REAL, JUDGE OF THE
UNITED STATES DISTRICT COURT:

The defendants JOHN C. MOON and ZION
INDUSTRIAL CORPORATION hereby apply to

this Court on an Ex Parte basis for an order vacating the Entry of the Judgment herein, or in the alternative changing the date of entry of judgment to the date this Motion was filed.

This motion is based upon the grounds that the judgment herein was entered prematurely, was entered without proper notice to the defendants and is void (Rule 52(a), 58, 60(b) of the Federal Rules of Civil Procedure and Rule 7(a) of the Local Rules of Practice for the United States District Court, Central District of California).

Said motion is further based upon the file herein, the attached Declaration of Robert J. Davis, the Memorandum of Points and Authorities and such additional oral and documentary evidence as

may be presented at, or prior to, the hearing in this Ex Parte Motion,

It is further requested that pursuant to Rule 62(b) of the Federal Rules of Civil Procedure that the Court stay the execution of or any proceedings to enforce the judgment pending the disposition of this motion.

LAW OFFICES OF ROBERT J. DAVIS

BY:

ROBERT J. DAVIS
Attorney for Defendants
JOHN C. MOON and ZION
INDUSTRIAL CORPORATION

APPENDIX C

DECLARATION OF ROBERT J. DAVIS

I, ROBERT J. DAVIS, do declare and state as follows:

1. I was the trial attorney for the defendants herein and still am the attorney of record for the defendants.

2. On October 28, 1982, I received in the mail from plaintiff's attorney the Proposed Judgment. I proceeded to prepare opposition to it. Noting that the Judgment was to be in accordance with the Court's findings of fact and conclusions of law separately filed in this action (item 15), which were not included in or a part of the document received on October 28, 1982. I contacted plaintiff's attorney to inquire of same. I was advised by Neil

Rubenstein that he had erroneously assumed the Court would be preparing its own findings of fact and conclusions of law and when he found out to the contrary he proceeded to prepare them and was in fact working on them at the time of my call. Mr. Rubenstein further advised that the findings of fact and conclusions of law would be messengered to me that day.

3. I left my office at or about 6:00 P.M. on October 28, 1982, having not received the findings of fact and conclusions of law. When I arrived at my office on October 29, 1982 I noticed the documents had been placed through the mail slot evidently between 6:00 P.M. on October 28, and 9:00 A.M. on October 29, 1982.

4. I then proceeded to further prepare

the opposition to the judgment, findings of fact and conclusions of law since those submitted were in the main contrary to the evidence as presented and the law thereabout. During my preparation of the opposition, I reread Local Rule 7(a) and Rules 52(a), 58 and 60(b) of the Federal Rules of Civil Procedure and concluded that the defendants had five days within which to file their opposition to the judgment, findings of fact and/or conclusions of law.

5. Accordingly, said opposition was timely filed with this Court on November 2, 1982. I assumed that November 2, 1982 would be the earliest date that the judgment would be signed and entered.

6. On November 3, 1982, at approximately 4:00 P.M., I collapsed while in my office. Paramedics from the Los

Angeles County Fire Department were summoned and I was eventually admitted to West Hills Hospital on that date for a possible heart attack and high blood pressure. I was subsequently released, ordered to stay away from my office and given medication - "Atenlonel" to take. The medication has the effect of making me very drowsy and dizzy at times, making it extremely hard to work in my office.

7. I returned briefly to my office on November 8, 1982 and noted for the first time pursuant to documents received from the Court and plaintiff's attorney that judgment herein had been entered by the Court on October 29, 1982, the date I first saw the proposed findings of fact and conclusions of law. I believe the Notice of Entry of Judgment was received

in my office on November 4, 1982, while I was away from it.

8. It is my belief that the judgment was entered prematurely, without allowing for the five day period of time as provided for in Local Rule 7(a) and Rules 52(a), 58 and 60(b) of the Federal Rules of Civil Procedure.

9. The instant request is made in order that the Court would have the opportunity to consider the objections to the judgment, findings of fact and conclusions of law filed November 2, 1982 and to allow the defendants the opportunity to timely file a motion for new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. A motion for new trial was not made within 10 days of the original date of the entry of judgment since there was no actual awareness of

the entry until the 10 day period had practically passed and although constructive knowledge was present at least as of November 4, 1982, counsel was unable to have actual knowledge of same or do anything about it due to the medical reasons cited above. Had the Judgment been entered pursuant to Local Rule 7(a) there would have been no necessity for this Motion.

10. It is requested that the entry of judgment herein be vacated or in the alternative that the date of entry of judgment be designated the date this motion is decided.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of November, 1982, at Calabasas, California.

/s/ Robert J. Davis

ROBERT J. DAVIS
Attorney at Law

POINTS AND AUTHORITIES

1. INTRODUCTION

On October 20, 1982, the Court orally rendered judgment in favor of plaintiff herein and requested plaintiff's counsel to prepare the judgment. A copy of the proposed judgment was received by defendants on October 28, 1982. The proposed judgment and findings of fact and conclusions of law it is believed were filed with the Court on October 29, 1982. Defendants filed opposition to the judgment and findings of fact and conclusions of law on November 2, 1982

and subsequently received notice that the judgment had been entered on the date of filing, October 29, 1982.

2. THE ENTRY OF JUDGMENT WAS PRE-MATURE AND MUST BE VACATED

Rule 7(a) of the Local Rules of the Central District in California provides that prior to the entry of judgment in a case such as this counsel for the successful party shall prepare in a certain specified format findings of fact and conclusions of law. The judgment shall provide that it is in accordance with the findings of fact and conclusions of law. Rule 7(a) goes on to specifically state:

"Unless the Court otherwise directs, no document governed by

this rule will be signed unless opposing counsel shall have endorsed thereon an approval as to form, or shall have failed to serve and file with the Clerk, within five days after service of a copy thereof, as shown by endorsement on the original or by affidavit of service a statement of objections to form and the grounds thereof."

The judgment was received on October 28, 1982, the findings of fact and conclusions of law were served on October 29, 1982. It is not believed that the Court directed otherwise, therefore the earliest that judgment could have been entered was November 3, 1982, five days after October 29,

1982. Since the judgment was prematurely entered it must be set aside and vacated.

3. FINDINGS OF FACT AND CONCLUSIONS
OF LAW ARE A NECESSARY PART OF
THE JUDGMENT

Rule 52(a) of the Federal Rules of Civil Procedure provides that "(i)n all actions tried upon the facts without a jury, or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58,"

As previously indicated, the findings of fact and conclusions of law were first served and filed on October 29, 1982. Since the findings of fact and

conclusions of law are a necessary part of the judgment, Rule 52(a), compliance with Local Rule 7(a) must be met.

4. THE COURT HAS THE AUTHORITY TO
VACATE THE JUDGMENT

Rule 60(b) provides in its applicable part that:

"(O)n motion and upon terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertance, surprise or excusable neglect . . . (4) the judgment is void . . . (6) any other reason justifying relief from the operation of the judgment."

As set forth herein the entry of October 29, 1982 not only was premature but was in a manner that defendants were not able to timely file their objections nor request a new trial. Accordingly, it is once again requested that the relief sought herein be granted,

Pursuant to Rule 62(b) the Court does have the authority to stay the execution of or any proceedings to enforce the judgment herein pending disposition of the instant motion. Such stay is respectfully requested.

Respectfully submitted:

ROBERT J. DAVIS
Attorney at Law

(Certificate of Mailing omitted)

APPENDIX D

ROBERT J. DAVIS
LAW OFFICES OF ROBERT J. DAVIS
ALFRED A. CALABRO
CALABRO, CALABRO & CALABRO
23501 Park Sorrento #212
Calabasas, CA 91302
(213) 887-5300

Attorney for Defendants
JOHN C. MOON and ZION
INDUSTRIAL CORPORATION

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HYOSUNG AMERICA, INC.,

Plaintiff,

vs.

JOHN C. MOON and ZION
INDUSTRIAL CORPORATION,

Defendants.

LODGED
1982 NOV 22
PM 2:01
CLERK, U.S.
DISTRICT COURT
CENTRAL
DISTRICT
OF CALIF.

CASE NO.:
CV 81 4784 R

MOTION FOR ORDER VACATING JUDG-
MENT, TO PERMIT CONSIDERATION OF
DEFENDANTS' OBJECTIONS TO FIND-
INGS OF FACT, CONCLUSIONS OF LAW,
AND JUDGMENT, AND IF SUCH BE
DENIED TO PERMIT DEFENDANTS TO
FILE MOTION FOR NEW TRIAL.

TO: HYOSUNG AMERICA, INC., AND ITS
ATTORNEYS OF RECORD:

TAKE NOTICE that on the ____ day of
November, 1982, at the hour of ____ A.M.
or as soon thereafter as counsel may be
heard in the Courtroom of the Honorable
Judge LAUGHLIN E. WATERS located in the
United States Courthouse, Los Angeles,
California, the Defendants, JOHN C. MOON
and ZION INDUSTRIAL CORPORATION will
move the Court for an Order Vacating the
Judgment entered herein (or in the
alternative to vacate and change the
date of entry of Judgment) so as to
permit the Court to consider the opposi-
tion of Defendants to the proposed
Findings of Fact, Conclusions of Law and
Judgment, which opposition papers were
filed with the Clerk of the Court and
served on November 2, 1982, and if such

objections be overruled, to then permit Defendants to file a Motion for a New Trial.

The Motion will be made upon the following grounds:

1. That the Judgment herein was entered prematurely, was entered without property notice to the Defendants and is void under Rules 52(a), 58 and 60(b) of the Federal Rules of Civil Procedure and Rule 7(a) of the Local Rules of Practice for the United States District Court, Central District of California.

2. That there are compelling reasons justifying relief from the operation of the Judgment under Rule 60(b) occasioned by the physical disability of Robert J. Davis, Esq., the then sole attorney of record for Defendants in this case. That the said Robert J. Davis filed and

served opposition papers to the Findings of Fact and Conclusions of Law on November 2, 1982, and the following day, November 3, 1982, at approximately 4:00 P.M., collapsed and required emergency medical treatment. That the said Robert J. Davis remained disabled and could not effectively protect the rights of the Defendants or otherwise move the Court until after the time had expired within which the Defendants could file and serve documents in support of a Motion for a New Trial.

3. That it would be in the interests of justice to grant said Motion so as to permit the Defendants to have their opposition papers to the Findings of Fact, Conclusions of Law and Judgment considered by the Court, and if such objections be denied, then to permit

Defendants to file a Motion for a New Trial.

Said Motion will be based upon all of the papers, pleadings and records in the file herein, including but not limited to, those papers in opposition to the proposed Findings of Fact, Conclusions of Law and Judgment herein served upon opposing counsel and filed with the Clerk of the Court on November 2, 1982, the Ex Parte Motion to Vacate Entry of Judgment or in the Alternative to Change the Date of Entry of Judgment filed with the Clerk of the Court on or about November 10, 1982, a copy of which is attached hereto, together with the supporting Declaration of Robert J. Davis and Points and Authorities, and such additional oral and documentary

evidence as may be presented at, or prior to, the hearing of this Motion.

It is further requested that pursuant to Rule 62(b) of the Federal Rules of Civil Procedure, that the Court stay execution of said Judgment and any proceedings to enforce the Judgment pending the hearing of this Motion.

It is further requested that time for the service and hearing of this Motion be shortened as provided in the accompanying Application for Order Shortening Time.

DATED: November 20, 1982.

Alfred A. Calabro,
of counsel for
Defendants

(Certificate of mailing omitted.)

APPENDIX E

ROBERT J. DAVIS
LAW OFFICES OF ROBERT J. DAVIS
ALFRED A. CALABRO
CALABRO, CALABRO & CALABRO
23501 Park Sorrento #212
Calabasas, CA. 91302
(213) 887-5300

Attorneys for Defendants
JOHN C. MOON and ZION
INDUSTRIAL COPORATION

HYOSUNG AMERICA, INC.,

Plaintiff,

vs.

JOHN C. MOON and ZION
INDUSTRIAL CORPORATION,

Defendants.

CASE NO.: CV 81 4784 R

EX PARTE

APPLICATION FOR ORDER SHORTENING
TIME AND DECLARATION
IN SUPPORT THEREOF
AND REQUEST FOR STAY
AND POINTS AND AUTHORITIES

L O D G E D
1982 Nov 22 PM 2:01
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.

COME NOW, the Defendants, JOHN C. MOON and ZION INDUSTRIAL CORPORATION and move the Court for an Order Shortening Time within which to file and serve their Motion for Order Vacating Judgment, to Permit Consideration of Defendants' Objections to Findings of Fact, Conclusions of Law, and Judgment, and if such be denied, to permit Defendants to file Motion for New Trial for the reasons and upon the grounds set forth in the attached Declaration of Alfred A. Calabro., Esq., and the Points and Authorities filed herewith. I have contacted opposing counsel and they do not consent to the granting of the relief requested.

Dated: November 22, 1982

/s/A. A. Calabro
Alfred A. Calabro,
of counsel
for Defendants

APPENDIX F

DECLARATION OF ALFRED A. CALABRO,
ESQ., FOR ORDER SHORTENING TIME

ALFRED A. CALABRO DECLARES as follows:

1. That I am one of the attorneys for Defendants.

2. The proposed Judgment in this case was filed by counsel for Plaintiff on October 29, 1982.

3. The Court, Judge MANUEL REAL, signed the Judgment on the same date it was filed, October 29, 1982.

4. Rule 7(a) of the Rules for the Central District provide generally that unless the Court otherwise directs, no document will be signed unless opposing counsel shall have approved the same or shall have failed to serve and file with the Clerk of Court within five days

after service of a copy thereof a statement of objections to form and the grounds thereof.

5. Under Rule 7(a), the earliest the Judgment could have been signed and entered was November 3, 1982, five days after October 29, 1982.

6. Before the five days expired, Robert J. Davis, Esq., then sole counsel for Defendants filed and served written objections to the Findings of Fact, Conclusions of Law and Judgment.

7. On November 3, 1982, at approximately 4:00 P.M., Mr. Davis collapsed while in his office and was transported to West Hills Hospital by paramedics from the Los Angeles County Fire Department for a possible heart attack and high blood pressure problems. Mr. Davis was ordered by his doctor to stay away

from his office and was given medication - "Antenlonel" to take. The medication had the effect of making Mr. Davis drowsy and dizzy and by reason thereof, Mr. Davis could not attend to business matters in his office.

8. Mr. Davis returned briefly to his office on November 8, 1982, and noted for the first time from documents received during his absence that the Judgment had been signed and entered on October 29, 1982, in violation of Rule 7(a). The Court had not waited the five days required by the Rule. Because of his illness, Mr. Davis could prepare no papers to vacate the Judgment or a New Trial Motion.

9. On November 10, 1982, Mr. Davis filed and served an Ex Parte Motion to Vacate Entry of Judgment or in the

Alternative to Change the Date of Entry of Judgment. However, by reason of the absence of Judge REAL from the Court, said Motion has not yet been acted upon. I have been advised that Judge REAL is in Florida and not expected to return until December 6, 1982.

10. Because of the continued illness of Mr. Davis, Defendants requested that Declarant become associated with Mr. Davis as counsel for Defendants. Such association was made November 17, 1982, and the formal association papers are being filed concurrently with this Application.

11. That the time within which a Notice of Appeal must be filed in this case will expire thirty days from October 29, 1982, and by reason thereof, there is not sufficient time to give the

notice required by the Rules to Plaintiff of a Noticed Motion to Vacate the Judgment and for other relief on behalf of the Defendants.

12. That by reason thereof, Defendants respectfully request that the Court shorten the time within which notice must be given for the hearing of Defendants' Motion to Vacate Judgment and for other relief as reflected in the accompanying Motion papers, so that said Motion may be heard by a Judge of this Court prior to the expiration of the time within which a New Trial Notice of Appeal must be filed.

13. It is further respectfully requested that pending the hearing of said Motion that execution of the Judgment be stayed so that the status quo of

the parties may be maintained as of October 29, 1982.

14. That to grant said Order Shortening Time would be in the interests of justice.

I DECLARE under penalty of perjury that the foregoing is true and correct.

SIGNED at Glendale, California, this 20th day of November, 1982.

/s/ A. A. Calabro
ALFRED A. CALABRO

POINTS AND AUTHORITIES

A written notice, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served no later than 1 day before the hearing, unless the court permits them to be served at some other time. Federal Rules of Civil Procedure, Rule 6(d).

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV 81-4784-R

Date November 24, 1982

Title Hyosung America, Inc., -v- John
C. Moon and Zion Industrial Corp.

DOCKET ENTRY

PRESENT:

HON. LAUGHLIN E. WATERS, JUDGE

Carolyn Jackson
Deputy Clerk

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

PROCEEDINGS:

THE COURT ORDERS the above entitled
case and judgement hereon are stayed
until December 13, 1982.

copies mailed to:

ROBERT J. DAVIS, ESQ.
23501 Park Sorrento
Suite 212
Calabasas, CA 91302

KIM & CHANG
700 South Flower Street
Suite 2330
Los Angeles, CA 90017

Initials of Deputy Clerk CJ

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV81-4784-R

Date December 13, 1982

Title Hyosung America, Inc. -v- John C.
Moon, et al

DOCKET ENTRY

PRESENT:

HON. MANUEL L. REAL , JUDGE

Loyette Fisher

Deputy Clerk

Florence Carcia
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Robert Davis

ATTORNEYS PRESENT FOR DEFENDANTS:

Susan Hoffman

PROCEEDINGS: Defendant's Motion to vacate entry of judgment, or in the alternative to change date of entry of judgment.

Hearing held and Court denies the Defendant's motion to vacate entry of judgment or in the alternative to change date of entry of judgment.

Initials of Deputy Clerk /s/ F4

APPENDIX 1

ROBERT J. DAVIS
LAW OFFICES OF ROBERT J. DAVIS
23501 Park Sorrento #212
Calabasas, CA. 91302
(213) 887-5300

ALFRED A. CALABRO
CALABRO, CALABRO & CALABRO
124 South Isabel Street
Glendale, CA. 91205
(213) 245-1846

Attorneys for Defendants JOHN C. MOON
and ZION INDUSTRIAL COPORATION

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HYOSUNG AMERICA, INC.,

Plaintiff,

vs.

JOHN C. MOON and ZION
INDUSTRIAL CORPORATION,

Defendants.

CASE NO.: CV 81 4784 R

NOTICE OF APPEAL ON
BEHALF OF DEFENDANTS

FILED
Dec 13 10:50 AM '82
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
BY _____

NOTICE IS HEREBY GIVEN that defendants JOHN C. MOON and ZION INDUSTRIAL CORPORATION hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Final Judgement entered in this action on the 29th day of October, 1982, and stayed to the 13th day of December, 1982. Motion to vacate judgement denied 12-13-82.

DATED: December 13, 1982

ROBERT J. DAVIS
LAW OFFICES OF ROBER J. DAVIS
ALFRED A. CALABRO
CALABRO, CALABRO & CALABRO

BY: _____
ROBERT J. DAVIS
Attorneys for Defendants
JOHN C. MOON and ZION
INDUSTRIAL CORPORATION

(Certificate of Mailing omitted)

APPENDIX J

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HYOSUNG AMERICA, INC.,
Plaintiff-Appellee,

vs.

JOHN C. MOON and ZION
INDUSTRIAL CORPORATION,
Defendants-Appellants.

NO. 82-6099

(C.D. Cal.No.
CV-81-4784-MLR)

MOTION TO DISMISS OR, IN
THE ALTERNATIVE, TO LIMIT
APPELLATE JURISDICTION

Pursuant to Rules 4(a) and 26(b),
Federal Rules of Appellate Procedure
("FRAP"), 28 U.S.C. § 2107, and Rule
60(b), Federal Rules of Civil Procedure,

plaintiff-appellee Hyosung America, Inc. ("appellee") hereby moves for an order dismissing this appeal or, in the alternative, for an order limiting appellate jurisdiction.

This Motion is made on the grounds that (1) appellants' notice of appeal was filed more than thirty days after the date of entry of the judgment appealed from ("the underlying judgment"); (2) the Rule 60(b) motion filed by appellants and denied by the district court did not toll the running of the thirty-day period; and (3) appellants at no time filed a motion pursuant to Rule 4(a)(5), FRAP, for extension of the time in which to file their notice of appeal. At best, appellants' notice of appeal is timely and effective only as to the limited issue of whether the

district court abused its discretion in denying appellants' Rule 60(b) motion.

This Motion is based on the Memorandum of Points and Authorities attached hereto, the Proposed Order attached hereto, the pleadings and papers from the district court record included in the Appendix filed concurrently with this Motion, the records and files herein, and such other evidence and argument as may be presented at any hearing on this Motion.

Dated: April 15, 1983.

Respectfully submitted,

TUTTLE & TAYLOR Incorporated
MILES N. RUTHBERG

By /s/Miles N. Ruthbert
Miles N. Ruthberg
Attorneys for Plaintiff-
Appellee
Hyosung America, Inc.

(Points and Authorities, Argument,
Declaration of Miles N. Ruthberg,
Proposed Order and Mailing Certificate
omitted)

APPENDIX K

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HYOSUNG AMERICA, INC.,

Plaintiff-Appellee,

vs.

JOHN C. MOON and ZION
INDUSTRIAL CORPORATION,

Defendants-Appellants.

NO. 82-6099

(C.C. Cal.No.
CV-81-4784-MLR)

OPPOSITION TO MOTION TO DISMISS
OR, IN THE ALTERNATIVE, TO
LIMIT APPELLATE JURISDICTION

Appellants oppose the motion on the grounds that: (1) The Stay of Judgment entered on November 24, 1982, pursuant to Rule 62(b) FRCP, tolled the running

of the thirty-day appeal period; (2) The appellate court has jurisdiction to decide an untimely appeal where appellant relied to his detriment on the district court's assurance that the time for appeal had been tolled; (3) The appellate court may remand an untimely appeal to the district court to determine whether the untimeliness of the appeal was due to excusable neglect, and alternatively, (4) An untimely appeal from a judgment may be treated as an appeal from denial of the post-trial motion.

This Motion is based on the Memorandum of Points and Authorities attached hereto, the documents from the district court record included in the Appendix filed with appellee's Motion To Dismiss, and such other evidence and argument as

may be presented at any hearing on this Motion.

Dated: May 2, 1983

Respectfully submitted,

ROBERT J. DAVIS
LAW OFFICES OF
ROBERT J. DAVIS
ALFRED A. CALABRO
CALABRO, CALABRO,
CALABRO & CALABRO

By: _____
ALFRED A. CALABRO
Attorneys for Defendants-
Appellants JOHN C. MOON
and ZION INDUSTRIAL
CORPORATION

(Points and Authorities, Argument and Certificate of Mailing omitted.)

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HYOSUNG AMERICA, INCORPORATED,
Plaintiff-Appellee,
vs.

JOHN C. MOON and ZION
INDUSTRIAL CORPORATION,
Defendants-Appellants.

No. 82-6099

DC# CV 81-4784-R MLR
Central California

ORDER

F I L E D
May 24 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

Before: WALLACE and SCHROEDER, Circuit
Judges.

Appellee's motion for dismissal of
the appeal is granted in part. The
motion for relief under Fed. R. Civ. P,

60(b) and the subsequent stay of execution order did not toll the time for appeal from the underlying judgment. This appeal is therefore limited to the issue of whether the district court abused its discretion in denying the Rule 60(b) motion. See Fed. R. App. P. 4(a)(4); Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257, 263 n.7 (1978); Plotkin v. Pacific Telephone and Telegraph Co., 688 F.2d 1291, 1292 (9th Cir. 1982). The parties will contact a conference attorney to arrange a further prebriefing conference.

MoCal 5/16/83

No. 83-284

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN C. MOON and ZION
INDUSTRIAL CORPORATION,

Petitioner,

vs.

HYOSUNG AMERICA, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO MOTION FOR DAMAGES
PURSUANT TO SUPREME COURT RULE 49.2

ALFRED A. CALABRO
Counsel of Record

CALABRO, CALABRO, CALABRO & CALABRO
124 South Isabel Street
Glendale, California 91205
(213) 240-4812

Attorneys for Petitioner.

OCT 14 PAGE 4

No. 83-284

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN C. MOON and ZION
INDUSTRIAL CORPORATION,

Petitioners,

vs.

HYOSUNG AMERICA, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO MOTION FOR DAMAGES
PURSUANT TO SUPREME COURT RULE 49.2

Petitioners oppose respondent's motion for an award of damages pursuant to Supreme Court Rule 49.2.

Petitioners seek certiorari to review the judgment of the Ninth Circuit Court Of Appeals dismissing petitioners' appeal from the judgment of the District Court For The Central District Of California. The Order dismissing the appeal from the underlying judgment is a final judgment disposing of the case on the merits. Jung v. K. & D. Mining Co. (1958) 365 U.S. 333, 78 S.Ct. 764, 2 L.Ed.2d 806; Catlin v. United States (1945) 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911; Rosenberg Bros. & Co., Inc. v. Curtis Brown Co. (1923) 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372.

The proceedings in the Ninth Circuit are limited to an appeal from the denial of petitioners' motion to vacate the judgment pursuant to Federal Rules Of Civil Procedure, Rule 60(b).

The pendency of the appeal from the Rule 60(b) motion does not affect the finality of the order dismissing the appeal from the underlying judgment. Federal Rules of Civil Procedure, Rule 60(b); Browder v. Director, Illinois Dept. of Corrections (1978) 434 U.S. 257, 98 S.Ct. 566, 54 L.Ed.2d 521.

A petition for Writ of Certiorari is the appropriate procedure to seek review of the appellate court's order dismissing petitioners' appeal from the underlying judgment. Humphrey v. Cady (1972) 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394; Carafas v. LaVallee (1968) 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554; Thompson v. Immigration and Naturalization Service (1964) 375 U.S. 385, 84 S.Ct. 397, 11 L.Ed.2d 404; United States v. F. & M. Shaefer Brewing Co. (1958) 356 U.S. 227, 78 S.Ct. 674, 2 L.Ed. 2d 721.

Petitioners seek certiorari to review a final judgment on the merits rendered by the Ninth Circuit Court Of Appeals. Petitioners have employed the appropriate procedure to obtain review of this judgment. Petitioners have not, and need not, invoke Supreme Court Rule 18 in this case.

An award of damages under Supreme Court Rule 49.2 is appropriate only where a petition for a Writ of Certiorari has been filed, and where there appears to be no ground for granting such a writ. Supreme Court Rules, Rule 49.2. There must be a clear showing of bad faith on the part of the petitioner. Illinois Brick Co. v. Illinois (1976) 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed. 2d 707, rehearing denied 323 U.S. 881, 98 S.Ct. 243, 54 L.Ed.2d 164; Fluro Electric Co. v. Branford Associates (2d Cir. 1973) 489 F.2d 320; West Virginia v. Chas. Pfizer & Co. (2d Cir. 1971) 440 F.2d 1079, certiorari denied 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115. An appeal presenting a unique problem is not frivolous so as to justify the assessment of damages against an appellant for prosecuting it. Jaeger v. Canadian Bank of Commerce (9th Cir. 1964) 327 F.2d 743. Damages will not be assessed if the appellant properly and vigorously urged his position. National Acceptance Co.

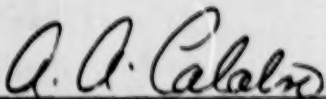
v. Frigidmeats, Inc. (7th Cir. 1980) 627 F.2d 764; NLRB v. Lucy Ellen Candy Div. of F. & F. Laboratories, Inc. (7th Cir. 1975) 517 F.2d 551.

Petitioners have invoked the jurisdiction of this court properly and in good faith. The petition involves important questions concerning the proper application of the federal rules of civil and appellate procedure. Accordingly, an award of damages pursuant to Supreme Court Rule 49.2 is not appropriate in this case.

Dated: October 5, 1983

Respectfully submitted,

CALABRO, CALABRO, CALABRO

By 
ALFRED A. CALABRO

Attorneys for Petitioners

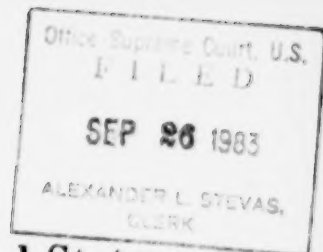
CERTIFICATE OF SERVICE

I, Alfred A. Calabro, a Member of the Bar of this Court, hereby certify that on October 5, 1983, I served the foregoing Opposition to Motion for Damages Pursuant to Supreme Court Rule 49.2 on Respondent Hyosung America, Inc., in this action in compliance with Supreme Court Rule 28.3 by causing a true copy thereof, enclosed in a sealed envelope with first-class postage prepaid, to be deposited in the United States mail at 313 East Broadway, Glendale, California, addressed to counsel of record for Respondent as follows:

Y. PETER KIM
TUTTLE & TAYLOR INCORPORATED
Attorneys at Law
60 South Grand Avenue
Los Angeles, California 90017

I declare under penalty of perjury that the foregoing is true and correct.

ALFRED A. CALABRO



No. 83-284
IN THE

Supreme Court of the United States

October Term, 1983

JOHN C. MOON and ZION INDUSTRIAL CORPORATION,
Petitioners,

vs.

HYOSUNG AMERICA, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT BEFORE JUDGMENT.

RESPONDENT'S BRIEF IN OPPOSITION.

RAYMOND C. FISHER,
Counsel of Record,
MILES N. RUTHBERG,
TUTTLE & TAYLOR INCORPORATED,
609 South Grand Avenue,
Los Angeles, Calif. 90017,
(213) 683-0600,

Y. PETER KIM,
609 South Grand Avenue,
Los Angeles, Calif. 90017,
(213) 683-0600,

Attorneys for Respondent,
Hyosung America, Inc.

Questions Presented for Review.

1. Whether certiorari before judgment should issue to review a routine prehearing order by the Court of Appeals, limiting petitioners' appeal to matters for which a timely notice of appeal was filed?

2. Whether certiorari before judgment should issue to review the Court of Appeals' interpretation of a District Court procedural order, where the Court of Appeals invited petitioners to seek clarification in the District Court before proceeding further in the Court of Appeals, and petitioners declined to exercise such opportunity?

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No. 83-284
IN THE
Supreme Court of the United States

October Term, 1983

JOHN C. MOON and ZION INDUSTRIAL CORPORATION,
Petitioners,

vs.

HYOSUNG AMERICA, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

The respondent Hyosung America, Inc. respectfully requests that this Court deny the petition for writ of certiorari before judgment, and award damages to respondent pursuant to Supreme Court Rule 49.2 in accordance with the motion filed concurrently herewith.

Opinion Below.

The Ninth Circuit's order is set forth as Appendix L to the petition for writ of certiorari and is not reported.

Jurisdiction.

Petitioners seek review of a prehearing order (hereinafter "the Order") entered by the Ninth Circuit on May 24, 1983. Contrary to the suggestion in the petition for writ of certiorari (hereinafter "the Petition") (Petition, at 2), the Order did not dismiss petitioners' entire appeal. Rather, the Order simply limited the appeal to those issues for which a timely notice of appeal had been filed by petitioners.

The appeal is still in its preliminary stages in the Ninth Circuit. Briefs on the merits have not yet been filed; oral argument before the Court has not yet been had; and the Ninth Circuit has not rendered its judgment. Indeed, the certified record from the District Court was only recently requested and has not yet been filed in the Court of Appeals. Thus, it is not clear whether this case is yet "in" the Court of Appeals for purposes of jurisdiction under 28 U.S.C. § 1254(1). *See, e.g., United States v. Nixon*, 418 U.S. 683, 689-90 (1974); R. Stern & E. Gressman, *Supreme Court Practice*, § 2.3, at 54 (5th ed. 1978). In any event, as set forth below, this case obviously does not meet the standards set forth in Supreme Court Rule 18 for granting certiorari to a federal court of appeals before judgment.

Statutory Provisions.

Rule 18, Rules of the Supreme Court of the United States:

CERTIORARI TO A FEDERAL COURT OF APPEALS BEFORE JUDGMENT

A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this court. *See* 28 U.S.C. § 2101(e); *see also, United States v. Bankers Trust Co.*, 294 U.S. 240 (1935); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936); *Carter v. Carter Coal Company*, 298 U.S. 238 (1936); *Ex parte Quirin*, 317 U.S. 1 (1942); *United States v. Mine Workers*, 330 U.S. 258 (1947); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Wilson v. Girard*, 354 U.S. 524 (1957); *United States v. Nixon*, 418 U.S. 683 (1974).

Statement of the Case.

This is a diversity action for breach of a contract to transfer stock and real property. The action was brought in the United States District Court for the Central District of California, by respondent Hyosung America, Inc. against petitioners John C. Moon and Zion Industrial Corporation. After a full trial on the merits the District Court entered judgment in favor of respondent on October 29, 1982 ("the October 29 Judgment").

Petitioners did not file an appeal from the October 29 Judgment within the 30-day period provided by Rule 4(a)(1), Federal Rules of Appellate Procedure ("FRAP"). Nor did they file any timely post-trial motion under Rules 50(b), 52(b), or 59 of the Federal Rules of Civil Procedure ("FRCP"), any of which would have extended the appeal time pursuant to Rule 4(a)(4), FRAP. Nor did petitioners seek any extension of the appeal time from the District Court pursuant to Rule 4(a)(5), FRAP.

What petitioners did do, on November 24, 1982, was to file a motion to vacate the October 29 Judgment pursuant to Rule 60(b), FRCP. (Petition, App. D.) Concurrently, petitioners filed an ex parte application for an order to (1) shorten the time for the hearing on the Rule 60(b) motion and (2) stay execution of the judgment, pursuant to Rule 62(b), FRCP, pending the hearing on the Rule 60(b) motion. (Petition, App. E.)

On November 24, 1982, the District Court entered an order staying execution of the October 29 Judgment until December 13, 1982, and the latter date was set for the hearing on the Rule 60(b) motion. (Petition, App. G.) At no time did petitioners seek, nor did the November 24 order ("the temporary Stay Order") in any way grant, petitioners an extension of time in which to file their appeal from the

October 29 Judgment.

On November 29, 1982, the 30-day time period expired for filing a notice of appeal from the October 29 Judgment.

On December 13, 1982, the District Court denied petitioners' Rule 60(b) motion to vacate the judgment. (Petition, App. H.) On that same date—45 days after the entry of the October 29 Judgment—petitioners filed their notice of appeal ("the Notice of Appeal"). (Petition, App. I.)

On February 25, 1983, at a prebriefing conference in the Ninth Circuit, the question of the timeliness of the Notice of Appeal was raised and discussed at length. Petitioners took the position that the District Court's temporary Stay Order, staying *execution* on the October 29 Judgment until December 13, 1982, also stayed the *entry* of that judgment (and the beginning of the time for filing a notice of appeal) until December 13, 1982. Petitioners could not explain how the District Court could have stayed entry of a judgment that had already been entered; nor could they explain why, if entry of the judgment was in fact stayed, the District Court's order did not so state.

Nonetheless, petitioners asked that they be given time in which to bring a motion in the District Court for clarification of the temporary Stay Order. Accordingly, the Conference Attorney informed the parties that an order would be entered giving petitioners until April 1, 1983 to obtain clarification of the Stay Order or withdraw the appeal, respondent agreed that if, by April 1, petitioners had not withdrawn their appeal, respondent would file a motion to dismiss or to limit appellate jurisdiction. An order to that effect was entered by the Ninth Circuit on March 7, 1983 (a copy of which is set forth as Appendix A hereto).

Appellants never sought clarification of the temporary Stay Order, as they had been invited to do. Accordingly,

respondent filed its motion to dismiss or to limit appellate jurisdiction. On May 24, 1983, the Ninth Circuit entered its order concluding that the Notice of Appeal was untimely as to the October 29 Judgment, but timely as to the District Court's December 13 order denying petitioners' Rule 60(b) motion. In accordance with *Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 263 n.7 (1978), the Ninth Circuit limited appellate jurisdiction to the issue of whether the District Court abused its discretion in denying the Rule 60(b) motion.

Petitioners did not request the court reporter or the clerk in the District Court to prepare the record on appeal until earlier this month, and the certified record has not yet been filed with the Ninth Circuit. Pursuant to the briefing schedule ordered by the Ninth Circuit, petitioners' opening brief in the Ninth Circuit is now due October 7, 1983, and respondent's brief in opposition is due November 9, 1983. (A copy of the Ninth Circuit's order establishing the briefing schedule is set forth as Appendix B hereto.)

REASONS FOR DENYING THE WRIT.

A. This Case Obviously Is Not of Such Imperative Public Importance as to Justify Certiorari Before Judgment in the Ninth Circuit.

This is a diversity case involving a wholly private dispute based on ordinary principles of state substantive law and federal practice and procedure. It is frivolous to seek certiorari before judgment in the Court of Appeals in this case. Obviously, and in contrast to such cases as *United States v. Nixon*, 418 U.S. 683 (1974), nothing about this case is "of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Rule 18, Supreme Court Rules.

B. The Questions on Which Petitioners Seek Review Are Not Properly Presented.

The questions presented in the Petition are all premised on petitioners' assertions as to their intent in seeking the temporary Stay Order in the District Court; the District Court's intent in granting such order; and petitioners' understanding of the effect of such order.

These same assertions were all made by petitioners in the Ninth Circuit. At petitioners' specific request, and out of an abundance of fairness, the Ninth Circuit suspended the progress of the appeal to allow petitioners to seek clarification from the District Court regarding its and the parties' understanding of the temporary Stay Order. Petitioners declined to exercise this opportunity, and it is remarkable to say the least that they now seek relief from the United States Supreme Court.

C. In Any Event the Ninth Circuit's Decision Was Clearly Correct and Does Not Conflict With the Decisions of Any Other Court of Appeals.

Petitioners have not, and cannot, assert any plausible basis for seeking certiorari before judgment; nor, as set forth above, are the questions raised by petitioners even properly presented in this case. The Petition is made even more frivolous by the fact that the Ninth Circuit's order in this case simply applies well-established rules of federal practice and procedure and, contrary to petitioners' assertions, does not conflict with the decisions of any other Court of Appeals.

It is black-letter law that (1) the 30-day appeal period set forth in Rule 4(a)(1), FRAP, is mandatory and jurisdictional; (2) pursuant to Rule 4(a)(4), FRAP, the only post-trial motions that toll the running of the 30-day period until disposition by the District Court are motions under Rules 50(b) (judgment notwithstanding the verdict), 52(b) (motion to amend or make additional findings of fact), or 59 (motion to alter or amend the judgment or motion for new trial), FRCP; and (3) the only other means for avoiding the 30-day time bar is to obtain a timely extension from the District Court pursuant to Rule 4(a)(5), FRAP, based "upon a showing of excusable neglect or good cause." See, e.g., *Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 263-65 & n.7 (1978); *Needham v. White Laboratories, Inc.*, 454 U.S. 927, 929-30 (1981) (Rehnquist, J., dissenting from denial of certiorari); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 204.12[1] (2d ed. 1983).

By its very terms, Rule 60(b) provides that a motion under its provisions "does not affect the finality of a judgment or suspend its operation." Rule 62(b) does give the District Court discretion to grant a stay of *execution* on a judgment

pending decision on a Rule 60(b) motion; but nothing in its terms overrides the express terms of Rule 4(a), FRAP, and Rule 60(b), FRCP, providing that the 30-day period for appeal is not tolled pending decision on the Rule 60(b) motion.

Petitioners attempt to manufacture an artificial "dilemma" (Petition, at 20), supposedly arising out of the fact that a Rule 60(b) motion does not toll the running of the 30-day period. Petitioners contend that (1) if a timely notice of appeal is filed from the underlying judgment the District Court is divested of jurisdiction to consider any Rule 60(b) motion; or (2) if a party refrains from filing a notice of appeal in order to preserve the District Court's jurisdiction to consider the Rule 60(b) motion, then that party loses the right to appeal the original judgment.

Under well-settled law, however, including the law of the Ninth Circuit, this "dilemma" simply does not exist. Different Circuits have worked out different mechanics for dealing with the problem, but in every Circuit there is a means readily available for pursuing both an appeal of the original judgment and a Rule 60(b) motion. For example, in the Ninth Circuit, the well-established procedure is to (1) file a notice of appeal from the original judgment, thus preserving such appeal; (2) then ask the District Court if it wishes to entertain the Rule 60(b) motion; and (3) if so, seek a remand from the Court of Appeals. *See, e.g., Long v. Bureau of Economic Analysis*, 646 F.2d 1310, 1318 (9th Cir. 1981). *See generally* 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 60.30[2] (2d ed. 1982); 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2873 (1973).

Petitioner also attempts to manufacture a conflict in the Circuits by citing to an unpublished Fourth Circuit opinion. *Paxman v. Wilkerson*, 502 F.2d 1163 (table), 18 Fed. R. Serv. 2d 1554 (4th Cir. 1974) (per curiam). That case does

not even address the question, however, of whether granting a Rule 62(b) stay pending disposition of a Rule 60(b) motion tolls the running of the 30-day period for appealing the original judgment. Rather, the opinion simply holds that, where a Rule 62(b) stay has been granted pending disposition of a Rule 60(b) motion, the proceedings in the District Court must go forward before the case is considered by the Court of Appeals. Although the reasoning in the opinion is obscure at best, and it obviously was not intended to be used as precedent, the opinion says nothing about the ultimate appealability of the underlying judgment.

Conclusion.

For the reasons set forth above, the petition for a writ of certiorari before judgment is frivolous and should be denied and, as set forth in the motion filed concurrently herewith, damages should be awarded to respondent pursuant to Supreme Court Rule 49.2.

Dated: September 22, 1983.

Respectfully submitted,

RAYMOND C. FISHER,
Counsel of Record,

MILES N. RUTHBERG,
TUTTLE & TAYLOR INCORPORATED,

Y. PETER KIM,
Attorneys for Respondent,
Hyosung America, Inc.

APPENDIX A.

Order.

United States Court of Appeals for the Ninth Circuit.

Hyosung America, Incorporated, Plaintiff-Appellee, vs.
John C. Moon and Zion Industrial Corporation, Defendants-
Appellants. No. 82-6099. D.C. # CV-81-4784-MLR Cen-
tral California.

Filed: March 7, 1983.

On February 25, 1983, a Prebriefing Conference was held
by Conference Attorney Richard G. R. Schickele. Appel-
lants were represented by Robert J. Davis and Alfred R.
Calabro. Appellee was represented by Miles N. Ruthberg.

If appellant does not withdraw this appeal by April 1,
1983, appellee will file a motion to dismiss or to limit
appellate jurisdiction on or before April 15, 1983. If the
appeal is not dismissed, appellants, on or before May 31,
1983 will contact the Conference Attorney to arrange a
second conference.

This order is subject to reconsideration by a judge if any
objection is filed within 10 days of the entry of the order.

FOR THE COURT:

/s/ **RICHARD G. R. SCHICKELE**

Richard G. R. Schickele

Conference Attorney

APPENDIX B.

Order.

United States Court of Appeals for the Ninth Circuit.

Hyosung America, Incorporated, Plaintiff-Appellee, vs.
John C. Moon and Zion Industrial Corporation, Defendants-
Appellants. No. 82-6099. D.C. # C-81-4784 R Central
California.

Filed: August 26, 1983.

On August 7, 1983, a Prebriefing Conference was held
by telephone before Conference Attorney Norman P. Vance.
Appellants were represented by Robert J. Davis and Alfred
A. Calabro and appellee was represented by Miles N.
Ruthberg.

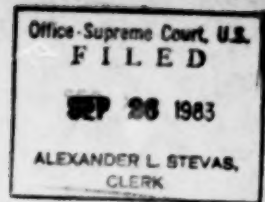
- (1) Appellants shall order and designate the reporter's
transcript on or before August 26, 1983.
- (2) Appellants shall file a brief of not more than 20
pages on or before October 7, 1983.
- (3) Appellee shall file a brief of not more than 20 pages
on or before November 9, 1983.
- (4) Appellants may file a reply brief of not more than
5 pages within 14 days of the service date of ap-
pellee's brief.
- (5) This order is subject to reconsideration by a judge
if any objection is filed within 10 days of the entry
of the order.

FOR THE COURT:

/s/ NORMAN P. VANCE

Norman P. Vance

Conference Attorney



No. 83-284

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN C. MOON and ZION INDUSTRIAL
CORPORATION,

Petitioners,

vs.

HYOSUNG AMERICA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT BEFORE JUDGMENT

MOTION FOR DAMAGES PURSUANT TO
SUPREME COURT RULE 49.2; DECLARATION
OF MILES N. RUTHBERG

RAYMOND C. FISHER,
Counsel of Record

MILES N. RUTHBERG,
TUTTLE & TAYLOR INCORPORATED,
609 South Grand Avenue,
Los Angeles, California 90017,
(213) 683-0600,

Y. PETER KIM,
609 South Grand Avenue,
Los Angeles, California 90017,
(213) 683-0600

Attorneys for Respondent,
Hyosung America, Inc.

No. 83-284

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN C. MOON and ZION INDUSTRIAL
CORPORATION,

vs.

HYOSUNG AMERICA, INC.,

Petitioners,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT BEFORE JUDGMENT

MOTION FOR DAMAGES PURSUANT TO
SUPREME COURT RULE 49.2

Respondent Hyosung America, Inc. respectfully moves for an award of damages pursuant to Supreme Court Rule 49.2. Petitioners are seeking certiorari before judgment in the Ninth Circuit. As set forth in Respondent's Brief in Opposition, filed concurrently herewith, the petition for certiorari ("the Petition") is frivolous. With all respect, petitioners have made a mockery of Supreme Court Rule 18 by invoking it in this case. Far from involving matters "of such imperative public importance as to justify the deviation from normal appellate practice" requested by petitioners, this is a diversity case involving run-of-the-mill issues of federal practice and procedure.

Accordingly, respondent seeks appropriate damages pursuant to Supreme Court Rule 49.2. As set forth in the attached Declaration of Miles N. Ruthberg, respondent's attorneys' fees and printing costs in responding to this frivolous petition will total in excess of \$3,000. Respondent respectfully requests an award of at least such amount.

Dated: September 22, 1983.

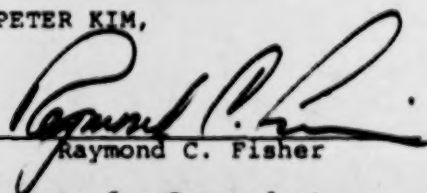
Respectfully submitted,

RAYMOND C. FISHER,
Counsel of Record

MILES N. RUTHBERG,
TUTTLE & TAYLOR INCORPORATED,

Y. PETER KIM,

By



Raymond C. Fisher

Attorneys for Respondent
Hyosung America, Inc.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

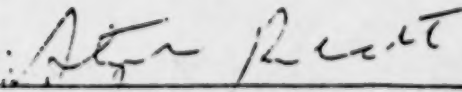
AUG 11 1983

PHILIP B. WINBERRY
CLERK OF COURT OF APPEALS

HYOSUNG AMERICA, INCORPORATED,)	No. 82-6099
)	
Plaintiff-Appellee,)	DC# CV 81-4784-R
)	Central California
vs.)	
)	
JOHN C. MOON and ZION INDUSTRIAL CORP.,)	ORDER
)	
Defendants-Appellants.)	
)	

Before: REINHARDT, Circuit Judge.

Appellants have informed the court of an intent to seek review of the court's order of May 24 in the Supreme Court. This does not relieve appellants of their obligation to dilligently prosecute this appeal. They will contact the office of the conference attorney within 7 days of the entry of this order to schedule a prebriefing conference. Failure to do so will result in dismissal of the appeal under 9th Cir. R. 19(b).


United States Circuit Judge

1-J 8/10/83

DECLARATION OF MILES N. RUTHBERG

I, Miles N. Ruthberg, declare as follows:

1. I am a member of the Bars of the Supreme Court of California and the District of Columbia Court of Appeals, and am a member of Tuttle & Taylor Incorporated, counsel for respondent Hyosung America, Inc. in this case.

2. I have been responsible for this case in the United States Court of Appeals for the Ninth Circuit and, under the supervision of Raymond C. Fisher of Tuttle & Taylor Incorporated, have been responsible for preparing the papers in opposition to the petition for certiorari in this Court. I make this Declaration in support of respondent's motion for damages pursuant to Supreme Court Rule 49.2.

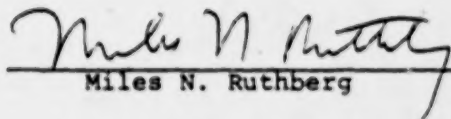
3. Including Mr. Fisher's time, my own time, and the time of Y. Peter Kim, co-counsel in this matter, a total of approximately 20 hours of attorney time have been expended in responding to the petition for certiorari, for a total cost of approximately \$2,500. The bulk of this time was expended on the brief in opposition to the certiorari petition; the remainder of the time was expended on the motion for damages.

4. Respondent has also incurred printing costs in excess of \$500 for the printing of respondent's brief in opposition to the petition for certiorari.

5. Respondent has thus incurred costs in excess of \$3,000 in responding to the petition for certiorari.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Los Angeles, California this 22nd day of September, 1983.

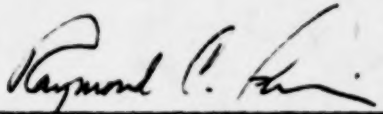

Miles N. Ruthberg

CERTIFICATE OF SERVICE

I, Raymond C. Fisher, a Member of the Bar of this Court, hereby certify that on September 22, 1983, I served the foregoing Motion for Damages Pursuant to Supreme Court Rule 49.2; Declaration of Miles N. Ruthberg on petitioners John C. Moon and Zion Industrial Corporation in this action in compliance with Supreme Court Rule 28.3 by causing a true copy thereof, enclosed in a sealed envelope with first-class postage prepaid, to be deposited in the United States mail at 609 South Grand Avenue, Los Angeles, California 90017, addressed to counsel of record for petitioners as follows:

Alfred A. Calabro
124 South Isabel Street
Glendale, California 91205

I declare under penalty of perjury that the foregoing is true and correct.



Raymond C. Fisher